

1992

Christa C. Schaumberg v. Thomas J. Schaumberg : Addendum

Utah Court of Appeals

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Kent T. Yano; Attorney for Appellee.

Frederick N. Green, Susan C. Bradford; Green and Berry; Attorneys for Appellant.

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ADDENDUM TO

SCHAUMBERG v. SCHAUMBERG

Case No. 920865CA

FILED DISTRICT COURT
Third Judicial District

OCT - 5 1992

By 151 SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

~~IN~~ AND FOR SALT LAKE COUNTY, STATE OF UTAH

CHRISTA C. SCHAUMBERG,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. 914903702 DA
vs.	:	
THOMAS J. SCHAUMBERG,	:	
Defendant.	:	

This matter was before the Court for trial on July 19, 1992, and July 30, 1992. On those dates evidence was offered and received by way of oral testimony, and the parties offered exhibits in support of their respective positions. Following the presentation of evidence, counsel made closing arguments and the Court took the matter under advisement to consider the evidence offered and the legal issues raised. At the conclusion of the trial, the Court also asked counsel to determine whether or not their clients would be able to agree upon a division of marital personal property such as household furnishings and furniture and other minor miscellaneous personal items. The Court was advised by letter following trial in this matter that the parties had, in fact, resolved

their differences on those items of personal property and that the Court need not deal with a distribution of household furniture and furnishings and distribution of other minor personal items.

The Court has considered the evidence offered and the applicable law, and being fully advised, enters the following Memorandum Decision.

RESIDENCY AND GROUNDS

The Court is satisfied that the requirements of residency have been shown in that the plaintiff has been a resident of Salt Lake County for at least three months prior to the commencement of these proceedings. The Court is also satisfied that during the course of this marriage irreconcilable differences arose between the plaintiff and the defendant as testified to by the parties during the course of their oral examination. The Court is satisfied that there is no possibility of reconciling this marriage, and that the marriage should be terminated on the basis of irreconcilable differences. The divorce will be final upon the signing and entry of the Findings of Fact, Conclusions of Law, and the Decree which will be prepared in this case.

PERSONAL PROPERTY

In accordance with the advice of plaintiff's counsel that the parties had reached an agreement regarding the distribution of their personal property, specifically, household furniture and furnishings, this Court awards to the plaintiff and the defendant the personal property that they have agreed upon by way of their stipulated distribution. The Court makes no determination as to the value which should be attributable to either party with respect to the property in question, in that the Court assumes that the parties have attained roughly equal distribution of the property.

MOTOR VEHICLES

The motor vehicles which have been acquired during the course of this marriage should be divided as follows: To the plaintiff, the 1970 Mazda 626 coupe, with a fair market value of \$4,787.00. To the defendant, the 1990 Dodge pickup, with an equity of \$500.00; the 1985 Jeep Wagoneer, with a fair market value of \$4,112.00; and the 1984 Yamaha motorcycle, with a fair market value of \$1,000.00.

The 1986 Mazda pickup truck, with a fair market value of \$2,300.00 has apparently been given by the parties to their

daughter for her use and benefit. The Court notes, however, that the vehicle is registered in the defendant's name. The parties are to take the appropriate action to transfer title of the 1986 Mazda pickup to their daughter, Elke, in Colorado so that the transfer of the vehicle will be formally accomplished.

REAL PROPERTY

The parties have acquired during the course of this marriage a number of real properties that require evaluation and distribution.

1. Residence in Salt Lake City: The home that the parties acquired here in Salt Lake City was to be sold and closed, with the net proceeds to be placed in counsel's trust account in an amount of approximately \$61,730.00. The entire amount of the equity is awarded to the plaintiff. Appropriate arrangements are to be made to insure that the funds from the sale of the home are transferred to plaintiff's accounts as she may direct.

2. Office building in Salt Lake City, Utah: During the course of the marriage, the defendant purchased an office building here in Salt Lake County which houses his financial advising business. The building was originally purchased with a down payment from an inheritance that the defendant

received from his family. The evidence suggests that the amount of the inheritance was approximately \$28,000.00 and was either used for the down payment or to upgrade the premises. The office building was financed and has a present outstanding mortgage of approximately \$45,000.00. The monthly mortgage obligation is being retired through the rents that defendant's financial business pays to the defendant as owner of the building. The present fair market value of the building is \$100,000.00. When the \$45,000.00 outstanding mortgage is subtracted from the fair market value, there is an equity of approximately \$55,000.00 in the building.

The defendant claims that he is entitled to the entire equity, because the increase in value of the building flows from his original separate property investment. The plaintiff suggests that she is entitled to participate in the appreciated value, but makes no claim against the original \$28,000.00 separate property used by the defendant to purchase the building.

When the equity of \$55,000.00 is reduced by the \$28,000.00 separate property, there is \$27,000.00 which represents equity that has been accumulated through appreciation.

Taking into account the facts of this case the Court, while recognizing that the initial investment was by way of separate

property, is satisfied that the plaintiff has made a contribution to the ongoing maintenance, as well as monthly payment of the building so as to allow her to participate in the appreciated equity and the \$27,000.00 figure is subject to distribution as a marital asset.

In that regard, the Court takes note of the fact that the income of the defendant earned during the course of the marriage in his private financial consulting business was and is being used to pay rent, which in turn satisfies the monthly mortgage obligation. Further in that regard, the Court notes that the rent being paid by the defendant's financial advising business to the defendant's building exceeds by a reasonably significant amount the ongoing mortgage payment. The defendant's income would be available for marital purposes if it were not being used to pay rent to the defendant's building.

Based upon the foregoing, the defendant makes a monthly contribution to the ongoing maintenance, as well as the reduction of the debt of defendant's building. Additionally, the defendant has testified that a \$25,000.00 loan that he has obtained from a former military service acquaintance was in part used to maintain and/or upgrade the building in question.

The defendant seeks to include the plaintiff in the responsibility for the \$25,000.00 debt, a concept with which the Court agrees, and therefore the plaintiff has made further contribution to the increased equity in the building. As indicated above, the plaintiff is entitled to share in the appreciation in the value of the building in an amount equal to \$27,000.00, which takes into account the defendant's initial separate property contribution. The entire equity that constitutes marital property, the \$27,000.00, is awarded to the defendant..

3. Arlington, Virginia apartment: During the course of the marriage the parties acquired an apartment/condominium in Arlington, Virginia. The Court determines that the fair present market value of that condominium is \$40,500.00. There is no formal recorded encumbrance on that property. The defendant claims that the \$25,000.00 debt referenced above loaned from a military acquaintance is secured by the Arlington, Virginia condominium. While documents that have been submitted suggest that to be the case, the Court notes those documents were never signed by the plaintiff, nor was she ever consulted regarding whether or not the monies being received by the defendant from his former military acquaintance

should become an encumbrance on the Arlington, Virginia apartment. Inasmuch as there can be no legitimate encumbrance filed against the ownership of the Arlington, Virginia condominium, the plaintiff not having executed the same, the Court is satisfied that the full \$40,500.00, less costs to dispose of the property, is available for distribution between the parties. The \$25,000.00 debt obligation needs to be addressed, however, and that will be dealt with as outlined hereafter.

The Arlington, Virginia apartment, together with its parking is to be sold and originally listed at its determined fair market value of \$40,500.00. The net proceeds from the sale are to be divided equally between the parties when they are received. The parties are ordered to cooperate in the sale of the property, and should the parties be unable to agree upon the mechanics of the sale or be unable to agree upon an offer that might be made less than the fair market value listing, they are at liberty to approach the Court for further assistance in that regard.

4. Colorado undeveloped land: During the course of the marriage, the parties acquired undeveloped land in the state of Colorado. The property represents a marital asset and the Court orders that the property be placed for sale at its fair

market value of \$8,000.00, and the net proceeds of the sale be divided equally between the plaintiff and the defendant.

The Court is aware of the claim of the defendant that the real property discussed here was anticipated to be a gift to a daughter. The basis for the gift, it is asserted, is that a similar gift was made to an older daughter. Unfortunately, the dissolution of the parties' marriage changes the parties' anticipated gift plans as it relates to their children. The transfer of the property has never been made, either legally or factually. It is a marital asset which needs to be divided between the parties. The parties may take any action with their share of the proceeds of the sale of the property that they wish when the property is sold.

The parties are ordered to cooperate in the selling of the property in Colorado so as to obtain its highest net price. If the parties are unable to agree upon the mechanics of the sale, they are at liberty, as with the Arlington, Virginia condominium, to approach the Court for further direction in that regard.

OTHER ASSETS:

During the course of the marriage, the parties have acquired IRA accounts in their respective names. The evidence

shows that the plaintiff has an IRA account in the amount of \$22,428.00, and the defendant has an IRA account in the amount of \$70,000.00. The parties will be awarded their respective IRA accounts for their own individual use and benefit.

During the course of the marriage the parties acquired an interest in an insurance policy with cash value which is to be divided equally between the parties - \$3,140.00 to each. Each party is subject to any penalties that may be attributable to the cashing in of the policy for purposes of division.

The defendant's financial consulting business has liquid assets which are valued at \$16,806.00. While there is some dispute as to that amount, the Court is satisfied that the \$16,806.00 figure is appropriate as of the date that this matter was tried. One-half of the liquid assets of the business are to be paid to each party, or \$8,403.00 to each. As defendant will be continuing in the business, he is to pay out the plaintiff's interest within 90 days.

The Court's calculations, based upon the division of the property ordered above excluding the property to be sold, would suggest that the plaintiff has received a value of \$100,288.00, and the defendant has received a value of \$114,155.00. So as to equalize the division of property, and the Court is

satisfied that an equal division is appropriate under the circumstances of this case, the defendant will be required to satisfy the entire \$25,000.00 obligation to his military acquaintance, which is evidenced by certain promissory notes received as exhibits during the course of this trial. As the defendant will be paying the plaintiff's \$12,500.00 share of the \$25,000.00 obligation which the Court finds to be a marital obligation, even though the plaintiff was never made aware of the same, the defendant in paying the plaintiff's share will basically, at least within a few hundred dollars, bring the parties' distribution equal.

The parties are ordered to execute the necessary documents of title and otherwise to carry out the orders of the Court in relation to the transfers of the property and other interests set forth above.

RETAINER PAY

As a result of the defendant's service in the United States military, he presently receives a retainer pay in a net amount of \$1,900.00 per month. The Court is satisfied that the defendant's retainer pay represents a marital asset that is subject to division. The evidence suggests that the defendant

was in the military for 26 years, and of that 26 years military service, for 16 of those he was married to the plaintiff. Sixteen of the 26 years amounts to 62% of the 26 years, and that percentage is the percentage to be applied to the defendant's retainer pay for the purposes of distribution. Plaintiff is entitled to half of the 62% of the defendant's retainer pay.

Sixty-two percent of the net retainer pay of \$1,900.00 per month equals \$1,178.00 per month. That figure should be divided equally and the plaintiff should receive \$589.00 per month of the defendant's net retainer pay. The parties are to execute the appropriate documentation to satisfy whatever statutory or other requirements may be necessary to carry into effect the intents of this provision relating to distribution of the retainer pay as a marital asset.

ALIMONY

In this action the plaintiff seeks permanent alimony. This is a marriage of some 26 years where both the plaintiff and the defendant contributed in their respective fashions to the ongoing marital relationship. The defendant has suggested that the plaintiff is entitled to no award of alimony inasmuch as she refused to undertake the necessary requirements that would normally be expected of a career officer's wife in the United

States military. With such a contention on the part of the defendant, the Court cannot agree. There is nothing in this record which the Court finds believable that would suggest that the defendant's military career was jeopardized by any perceived misconduct on the part of the plaintiff as the defendant's wife in failing to participate in military activities that would normally be required of a military spouse. The plaintiff has raised two children, worked part-time from time to time during the course of the marriage, and has made a substantial and significant contribution to the ongoing relationship until such time as it deteriorated requiring the parties to seek a divorce.

The disparity of potential earning capacity of the parties is wide. The plaintiff does not presently work full-time but the Court is satisfied that income should be imputed to her in accordance with the evidence received during the course of this trial. The Court is satisfied that if the plaintiff sought full-time employment in an area that she has expertise, such as retail sales, she could gross approximately \$12,000.00 per year, or \$1,000.00 per month gross. She will enjoy the portion of the retainer income from defendant's military retirement in the approximate amount of \$589.00 per month net, which will provide her a net monthly income of approximately \$1,450.00.

The Court has assumed an approximate 25% tax bracket on the imputed income.

The defendant, on the other hand, has testified that he has available to him on a monthly basis approximately \$4,200.00 net. The Court assumes that such figure would include his portion of the retainer income and probably does not account for the business advantages he enjoys, such as automobile reimbursement at company expense, which decreases his monthly obligations. The defendant in Exhibit D-22, has suggested that his net monthly income from all sources is \$3,679.00 per month net. It is unclear to the Court why a disparity exists between the defendant's exhibits and defendant's testimony regarding net monthly income, but under either fact scenario relating to net monthly income the Court is satisfied that permanent alimony ought to be paid to the plaintiff by the defendant in the sum of \$800.00 per month. The alimony would terminate on the usual and customary conditions such as remarriage of the plaintiff, death of the plaintiff or the defendant, or should the plaintiff cohabit so as to terminate alimony under the case laws enunciated by the Supreme Court of this state.

In determining the amount of alimony and evaluating the parties' potential for income, the Court has not taken into

account the potential investments that the plaintiff may make so as to increase her income from her share of the assets that have been divided. The Court has declined to do so, inasmuch as the defendant has the same option to increase his income, and because the asset distribution is basically equal, the potential increased earnings cancel one another.

ATTORNEY'S FEES

In this case, the plaintiff seeks attorney's fees for both her present and prior attorney. In determining whether attorney's fees are appropriate in a domestic relations matter such as this, the Court is required to determine whether or not one party is in need of assistance in paying for an attorney, and whether or not the party against whom the attorney's fees are sought has the ability to contribute towards attorney's fees.

Based upon the distribution of the assets of the parties and that the assets that have been awarded the plaintiff include more liquid assets than are available to the defendant, and because of the amount of the assets that are available to each party, the Court is satisfied that an award of attorney's fees in favor of the plaintiff and against the defendant would


be inappropriate in this case. While the defendant has the potential for greater income in the future than does the plaintiff, ^{now} a portion of that will be paid as alimony to the plaintiff, moving towards equalization of the parties' income. The defendant, because of his voluntary decision to finance his daughter's education, will have a substantially greater shortfall than will the plaintiff in meeting ongoing monthly expenses. Those considerations, together with the substantial liquid assets that have been attributed to the plaintiff require this Court to reach a conclusion that both the plaintiff and the defendant should bear and pay their own respective attorney's fees.

As set out heretofore, this Court orders that the parties execute the necessary documents of title and other documents which may be necessary to carry out the distribution of the assets set forth in this Memorandum Decision.

Counsel for the plaintiff is requested to prepare an appropriate set of Findings of Fact and Conclusions of Law, and further prepare a proposed Decree, all in accordance with this Court's Memorandum Decision, and to submit those documents to counsel for the defendant for review as to form and content. Once the parties have agreed upon the form of the appropriate

final documents, they should be submitted to the Court for review and signature pursuant to the Code of Judicial Administration.

Dated this 2 day of October, 1992.



TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Memorandum Decision, to the following,
this 5 day of October, 1992:

Kent T. Yano
Attorney for Plaintiff
2225 East 4800 South, Suite 109
Salt Lake City, Utah 84117

Frederick N. Green
Attorney for Defendant
10 Exchange Place, Suite 622
Salt Lake City, Utah 84111

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COPY

KENT T. YANO
Attorney for Plaintiff
2225 East 4800 South, Suite 109
Murray-Holladay Road
Salt Lake City, Utah 84117
Telephone (801) 277-7331
Bar #3573

THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, STATE OF UTAH

CHRISTA C. SCHAUMBERG,)	
Plaintiff)	DECREE OF DIVORCE
vs.)	
THOMAS J. SCHAUMBERG,)	Civil No. 914903702DA
Defendant)	Judge Timothy R. Hanson

This matter came on for trial on the 19th and 30th days of July, 1992 before the Honorable Timothy R. Hanson, District Judge. Plaintiff appeared personally, with counsel, Kent T. Yano, while Defendant appeared personally, with counsel, Frederick N. Green. On those dates evidence was offered and received by way of oral testimony and the parties offered exhibits in support of their respective positions. Following the presentation of evidence, counsel made closing arguments and the Court took the matter under advisement to consider the evidence offered and the legal issues raised. At the conclusion of the trial, the Court requested counsel to determine whether or not the clients would be able to agree upon the division of the marital personal property and other minor miscellaneous personal items. The Court was subsequently advised by letter following the trial that the parties had, in fact, resolved their differences on those items of personal property and the Court need not deal with the distribution of said items.

The Court having considered the evidence offered and the applicable law, and being fully advised in the premises and there being more than 90 days having elapsed since the filing of the

Complaint, and having heretofore entered its Findings of Facts and Conclusions of Law, THE COURT, NOW, THEREFORE, ORDERS, ADJUDGES AND DECREES THE FOLLOWING:

1. That Plaintiff be, and she hereby is, awarded a Decree of Divorce from Defendant, the same to become final immediately after signature by the Court and entry with the Clerk of the above entitled Court.

2. That Plaintiff be, and she hereby is, awarded all of the equity resulting from the sale of the parties' marital home at 2048 Brady Creek Circle, Sandy, Utah, in the approximate sum of \$61,730.00.

3. That Defendant be, and he hereby is, awarded all of the equity in and to the office building located at 765 East 4500 South, Salt Lake County, Utah, in the approximate sum of \$27,000.00.

4. That the Co-Op in Arlington, Virginia, together with the parking space be, and hereby is, immediately ordered to be placed for sale and the net proceeds divided equally between the parties.

5. That unimproved property in the State of Colorado be, and hereby is, ordered immediately placed for sale and the parties are ordered to equally divide the net proceeds derived therefrom.

6. That each of the parties be, and they hereby are, awarded their respective Individual Retirement Accounts (IRA's) accumulated in their own names resulting in an award to Plaintiff of her IRA in the approximate sum of \$22,428.00 and an award to the Defendant of his IRA in the approximate sum of \$70,000.00.

7. That cash value of the insurance policy be, and hereby is, awarded equally divided between the parties resulting in an award of \$3,140.00 to each. The award is subject to any penalties that may be attributable to the cashing in of the policy for purposes of this division.

8. That each of the parties be, and they hereby are, awarded 1/2 of the liquid assets in Defendant's financial

consulting business, or, \$8,403.00 to each. Defendant be, and he hereby is, ordered to purchase the Plaintiff's interest within 90 days of the signing of the Decree of Divorce.

9. That Defendant be, and he hereby is, ordered to assume and discharge, holding Plaintiff harmless therefrom, the entire \$25,000.00 obligation testified to by Defendant which is owed to his military acquaintance that was allegedly secured by the Arlington, Virginia Co-Op.

10. That Plaintiff be, and she hereby is, awarded 1/2 of Defendant's net military retainer pay of \$1,900.00 per month that was accumulated during the marriage of the parties, or, \$589.00 per month. The parties be, and they hereby are, ordered to execute the appropriate documentation to satisfy whatever statutory or other requirements that may be necessary to effectuate the intent of this retainer award.

11. That Plaintiff be, and she hereby is, awarded alimony from Defendant in the sum of \$800.00 per month which alimony shall terminate upon the death of either of the parties, the remarriage of the Plaintiff, or the co-habitation of the Plaintiff as defined by the case laws enunciated by the Supreme Court of the State of Utah.

12. Each of the parties be, and they hereby are, ordered to assume and discharge their own attorney's fees and Court costs incurred.

13. That each of the parties be, and they hereby are, ordered to execute the necessary documents of title and other documents that may be necessary to carry out the distribution of the assets as set forth in the Decree of Divorce.

DATED this _____ day of _____, 1992.

BY THE COURT:

DISTRICT JUDGE

NOTICE TO COUNSEL

Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified that the undersigned will retain the original of this document for a period of five days from the date of service upon you. Notice of Objections must be submitted to the Court and counsel within five days after service. If no objections are received by counsel preparing the Order, the original shall be submitted to the Court for signature.

KENT T. YANO

MAILING CERTIFICATE

Mailed a true and correct copy of the foregoing Decree of Divorce to Defendant:

Mr. Thomas J. Schaumberg
c/o 765 East 4500 South
Salt Lake City, Utah 84107

postage prepaid this _____ day of _____, 1992.

KENT T. YANO

COPY

KENT T. YANO
Attorney for Plaintiff
2225 East 4800 South, Suite 109
Murray-Holladay Road
Salt Lake City, Utah 84117
Telephone (801) 277-7331
Bar #3573

THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, STATE OF UTAH

CHRISTA C. SCHAUMBERG,)	
)	FINDINGS OF FACT
Plaintiff)	AND
vs.)	CONCLUSIONS OF LAW
THOMAS J. SCHAUMBERG,)	Civil No. 914903702DA
)	Judge Timothy R. Hanson
Defendant)	

This matter came on for trial on the 19th and 30th days of July, 1992 before the Honorable Timothy R. Hanson, District Judge. Plaintiff appeared personally, with counsel, Kent T. Yano, while Defendant appeared personally, with counsel, Frederick N. Green. On those dates evidence was offered and received by way of oral testimony and the parties offered exhibits in support of their respective positions. Following the presentation of evidence, counsel made closing arguments and the Court took the matter under advisement to consider the evidence offered and the legal issues raised. At the conclusion of the trial, the Court requested counsel to determine whether or not the clients would be able to agree upon the division of the marital personal property and other minor miscellaneous personal items. The Court was subsequently advised by letter following the trial that the parties had, in fact, resolved their differences on those items of personal property and the Court need not deal with the distribution of said items.

The Court having considered the evidence offered and the applicable law, and being fully advised in the premises and there

being more than 90 days having elapsed since the filing of the Complaint, enters the following Findings of Fact:

1. That Plaintiff has been a resident of Salt Lake County, State of Utah, for more than three months immediately prior to the commencement of this action.

2. That during the marriage of the parties' irreconcilable differences arose between the parties and there is no possibility of reconciling their marriage.

3. That the parties were married each to the other in December, 1967 in the Country of Germany.

4. That two daughters were born as issue of said marriage, Elke, and Sabine both of whom are emancipated adults.

5. That Defendant is a former Lieutenant Colonel who retired from the military after 26 years of service in 1983.

6. That the parties owned a marital residence commonly known as 2048 Brady Creek Circle, Sandy, Utah, which residence had been placed for sale prior to the trial of this matter and the closing of said sale was to take place 1 day after the conclusion of the trial. The residence had an approximate equity of \$61,730.00.

7. That the parties acquired an office building in Salt Lake City, Utah at 765 East 4500 South. The building was originally purchased with a down payment from an inheritance of approximately \$28,000.00 received from his family.

8. The office building was financed and has a present outstanding mortgage of approximately \$45,000.00 which mortgage is being retired to the rents that Defendant's financial business pays to the Defendant as owner of the building.

9. The present fair market value of the building is \$100,000.00 resulting in an equity in and to the building of approximately \$55,000.00.

10. The rent being paid by the Defendant's financial advising business to the Defendant's building exceeds, by a reasonably significant amount, the ongoing mortgage payment.

11. That the parties acquired during their marriage a co-op apartment in Arlington, Virginia with a fair market value of \$40,500.00.

12. The Defendant claimed that a \$25,000.00 debt is secured by the co-op resulting from a loan from a military acquaintance.

13. The documents submitted by the Defendant to the Court as evidence of the debt were not signed by the Plaintiff nor was the Plaintiff consulted regarding whether or not the monies being received from the loan should become an encumbrance upon said co-op.

13. Because the Plaintiff never executed any of the documents as evidence of the encumbrance, the Court finds that the full \$40,500.00 less costs of sale is available for distribution between the parties.

14. That the parties acquired certain undeveloped land in the State of Colorado that has an approximate market value of \$8,000.00.

15. The Defendant claimed that the unimproved real property was anticipated to be a gift to one of the daughters of the parties.

16. The transfer of the property never having been made and the resulting divorce proceedings having been filed, said undeveloped property is a marital asset which should be divided equally between the parties upon the sale of the same.

17. That the parties have accumulated their separate Individual Retirement Accounts (IRA's), in their respective names. The Plaintiff has an IRA account in the amount of \$22,428.00 and the Defendant has an IRA account in the amount of \$70,000.00.

18. That the parties have acquired an interest in an insurance policy with a cash value of \$3,140.00 that may be subject to penalties in the event the policy is cashed in for the purposes of dividing the same.

19. The Defendant's financial consulting business has liquid assets that the Court finds are valued at \$16,806.00.

20. That the Court finds that the personal property division accomplished by the parties are approximately equal in value.

21. The Court's calculations based upon the division of the property excluding the property to be sold suggests that the Plaintiff has received the value of \$100,288.00 and the Defendant has received the value of \$114,155.00.

22. In an attempt to equalize the division of the properties, the Court finds it is appropriate that the Defendant be required to satisfy the entire \$25,000.00 obligation to his military acquaintance.

23. That as a result of the Defendant's service in the United States Military, he receives a retainer pay in the net amount of \$1,900.00 per month. That said retainer pay represents a marital asset subject to division.

24. That the Defendant was in the military for 26 years and of those 26 years a military service, he was married to the Plaintiff for 16 of those years.

25. That 16 of the 26 years equals 62% and, therefore, the Court find that the Plaintiff is entitled to 1/2 of the 62% of Defendant's retainer pay, or, \$589.00 per month.

26. That with regard to the alimony prayer of the Plaintiff, the Defendant testified that the Plaintiff was not entitled to an alimony inasmuch as she refused to undertake the necessary requirements that would normally be expected of a career officer's wife in the United States Military.

The Court does not agree with such a contention and the fact that the Plaintiff raised 2 children, worked part-time from time to time during the course of the marriage and made a substantial and significant contribution to the relationship until such time as the parties sought a divorce, considered with the disparity of earning capacity of the parties, the Court finds that a permanent alimony award of \$800.00 per month is appropriate.

27. The Court finds that if the Plaintiff sought full-time employment in the area that she has an expertise, she could gross

approximately \$12,000.00 per year, or \$1,000.00 per month gross which sum is imputed to her in the Court's calculations of awarding alimony.

28. That Plaintiff's shares of Defendant's military which is \$589.00 per month together with her imputed income of \$1,000.00 per month would provide Plaintiff a net monthly income of approximately \$1,450.00.

29. That the Defendant, having testified he has available to him approximately \$4,200.00 per month as income and having considered the disparity of the parties' income, the Court finds that an award of \$800.00 permanent alimony to the Plaintiff is appropriate.

30. That each of the parties incurred attorney's fees and, in Plaintiff's case, Plaintiff incurred fees for both her present and prior attorney.

31. Based upon the distribution of the assets of the parties and that the assets having been awarded to the Plaintiff include more liquid assets than are available to the Defendant, and because of the amount of the assets that are available to each party, the Court feels that it is reasonable and equitable that each of the parties assume and discharge their own costs and fees.

32. A further factor in the Court finding that each party should bear their own fees is the Defendant's voluntary decision to finance his daughter's education resulting in a greater shortfall than will the Plaintiff in meeting ongoing monthly expenses.

HAVING HERETOFORE, entered its Findings of Fact, the Court now enters the following conclusions of Law:

1. That Plaintiff should be awarded a Decree of Divorce from Defendant, the same to become final immediately after signature by the Court and entry with the Clerk of the above entitled Court.

2. That Plaintiff should be awarded all of the equity resulting from the sale of the parties marital home at 2048 Brady Creek Circle, Sandy, Utah in the approximate sum of \$61,730.00.

3. That Defendant should be awarded all of the equity in and to the office building located at 765 East 4500 South, Salt Lake County, Utah, in the approximate sum of \$27,000.00.

4. That the co-op in Arlington, Virginia together with the parking space should be immediately placed for sale and the net proceeds divided equally between the parties.

5. That the unimproved property in the State of Colorado should be immediately placed for sale and the parties should be ordered to equally divide the net proceeds derived therefrom.

6. That each of the parties should be awarded their respective IRA accounts accumulated in their own names resulting in an award to Plaintiff of her IRA in the sum of \$22,428.00 and an award to the Defendant of his IRA in the approximate sum of \$70,000.00.

7. That the cash value of the insurance policy should be divided between the parties resulting in an award of \$3,140.00 to each. The award in this regard is subject to any penalties that may be attributable to the cashing in of the policy for purposes of division.

8. That each of the parties are awarded 1/2 of the liquid assets in Defendant's financial consulting business or, \$8,403.00 to each. Defendant should be ordered to purchase the Plaintiff's interest within 90 days of the signing of the Decree of Divorce.

9. That Defendant should be ordered to assume and discharge, holding Plaintiff harmless therefrom, the entire \$25,000.00 obligation testified to by the Defendant which is owed to his military acquaintance that was allegedly secured by the Arlington, Virginia co-op.

10. That of the Defendant's \$1,900.00 per month military retainer pay, the Plaintiff should be awarded 1/2 of said retirement pay representing the 16 year marriage of the parties, or, \$589.00 per month. The parties should be ordered to execute the appropriate documentation to satisfy whatever statutory or other requirements that may be necessary to effectuate the

intents of this retirement award relating to the distribution of the retainer pay as a marital asset.

11. That Defendant should be ordered to pay to Plaintiff alimony in the sum of \$800.00 per month which alimony would terminate upon the death of either of the parties, the remarriage of the Plaintiff, or the co-habitation of the Plaintiff as defined by the case laws enunciated by the Supreme Court of the State of Utah.

12. That each of the parties should be ordered to assume and discharge their own attorney's fees and Court costs incurred.

13. That the Memorandum Decision of the Court dated October 2, 1992, and filed with the Clerk of the Court on October 5, 1992, should be incorporated into the Findings of Fact and Conclusions of Law and Decree of Divorce.

14. Each of the parties should be ordered to execute the necessary documents of title and other documents that may be necessary to carry out the distribution of the assets as set forth in the Decree of Divorce.

DATED this _____ day of _____, 1992.

BY THE COURT:

DISTRICT JUDGE

NOTICE TO COUNSEL

Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified that the undersigned will retain the original of this document for a period of five days from the date of service upon you. Notice of Objections must be submitted to the Court and counsel within five days after service. If no

objections are received by counsel preparing the Order, the original shall be submitted to the Court for signature.

KENT T. YANO

MAILING CERTIFICATE

Mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to:

Mr. Thomas Schaumberg
765 East 4500 South
Salt Lake City, Utah 84107

postage prepaid this _____ day of _____, 1992.

KENT T. YANO

NOTES TO DECISIONS

ANALYSIS

Both parties at fault.
Cruel treatment.

Both parties at fault.

Marriage may be dissolved by making a grant of divorce to each party where each was equally at fault. *Mullins v. Mullins*, 26 Utah 2d 82, 485 P.2d 663 (1971).

Cruel treatment.

Acts constituting cruel conduct sufficient to cause great mental distress need not be aggravated and more severe when directed toward the husband than when directed toward the wife. *Hansen v. Hansen*, 537 P.2d 491 (Utah 1975).

30-3-3. Temporary alimony and suit money.

The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

History: R.S. 1898 & C.L. 1907, § 1210; C.L. 1917, § 2998; R.S. 1933 & C. 1943, 40-3-3.

NOTES TO DECISIONS

ANALYSIS

Appealability of order.
Appeal from order.
Attorney fees.
Attorney fees for appeal.
Attorney's lien on alimony.
Contempt proceedings.
Contesting petitioner for modification.
Costs and expenses on appeal.
Discretion of trial court.
Enforcement of order or decree.
Jurisdiction.
Mandamus.
Order of court.
Stipulation and effect thereof.

Appealability of order.

Formal order made in divorce action, called a "judgment" directing that judgment be entered for benefit of defendant's attorneys, is not final and appealable. *Rolando v. District Court*, 72 Utah 459, 271 P. 225 (1928).

Appeal from order.

Where there were no findings or evidence in record as to attorney's fees, Supreme Court remanded issue for disposition by trial court but allowed wife's attorney \$100 for services rendered with reference to husband's appeal from judgment modifying divorce decree. *Parish v. Parish*, 84 Utah 390, 35 P.2d 999 (1934).

Supreme Court assumed that evidence supported award of suit money to wife where no testimony as to wife's need was before the court on appeal on judgment roll from the decree of no cause of action in husband and awarding of expenses of suit, attorney's fees

and temporary alimony to wife. *Weiss v. Weiss*, 111 Utah 353, 179 P.2d 1005 (1947).

Attorney fees.

Allowance of \$200 as wife's attorney's fee in divorce proceeding was not inadequate even though husband was worth approximately \$40,000, where proceedings from time of commencement until entry of decree lasted less than two months and trial itself was completed in less than two days. *Blair v. Blair*, 40 Utah 306, 121 P. 19, 38 L.R.A. (n.s.) 269, 1914D Ann. Cas. 989 (1912).

Where decree of divorce was obtained by mother of minor children against father, who was required to pay certain sum periodically for support, care, maintenance, and education of such children, and he, without sufficient cause, refused to comply with decree, as result of which mother was compelled to bring proceedings against him, father was required to pay counsel fees in such proceedings. *Tribe v. Tribe*, 59 Utah 112, 202 P. 213 (1921).

Court properly awarded attorney's fees to wife in subsequent proceeding on application of wife for arrears in alimony. *Christensen v. Christensen*, 65 Utah 597, 239 P. 501 (1925).

Fifty dollars was a reasonable fee where wife petitioned to require husband to show cause why he should not be punished for contempt for failure to pay support money and husband filed cross-petition for modification of decree and where it was shown that wife was without means to prosecute the cause or pay counsel. *Scott v. Scott*, 105 Utah 376, 142 P.2d 198 (1943).

While fact that wife is able to pay expenses